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No. 67

JULIAN BOND, *et al.*,

*Appellants,*

v.

JAMES "SLOPPY" FLOYD, *et al.*,

On Appeal from the United States District Court for the Northern District of Georgia (Atlanta Division)

# BRIEF OF AMERICAN JEWISH CONGRESS *AMICUS CURIAE*


[redacted]

*Attorneys for American Jewish Congress*

[redacted]

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IN THE

# Supreme Court of the United States

October Term, 1966

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**No. 87**

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JULIAN BOND, *et al.*,

*Appellants,*

*v.*

JAMES "SLOPPY" FLOYD, *et al.*

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**On Appeal from the United States District Court for the Northern District of Georgia (Atlanta Division)**

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## BRIEF OF AMERICAN JEWISH CONGRESS *AMICUS CURIAE*

The American Jewish Congress has sought and received the consent of the parties to submit this brief *amicus curiae.*

### Statement

In a special election held June 16, 1965, appellant, Julian Bond, having received 82% of the votes cast, was duly elected to the Georgia House of Representatives as the

representative from the 136th House District, Fulton County, Georgia, for the term expiring January 1, 1967 (R. 105-106).* Earlier, Bond had received the Democratic nomination, in a primary election, in which he prevailed over his opponent by a majority of more than 2 to 1 (R. 105-106).

House District 136 was created and the primary and special elections were held pursuant to the order of the court below in *Toombs* v. *Fortson*, 241 F. Supp. 65 (N. D. Ga. 1965), approving on an interim basis a proposed reapportionment of the Georgia Legislature. Bond, the candidates who opposed him in the primary and special elections, and 90% of the registered voters in the 136th District are Negroes (R. 105-106).

On January 6, 1966, subsequent to Bond's election, the Student Non-Violating Coordinating Committee, an organization of which Bond was an official, issued a statement (a) criticizing American policy in Vietnam as "undemocratic," "hypocritical" and "aggressive," (b) expressing sympathy with those "unwilling to respond to a military draft" and (c) urging "work in the civil rights movement and with other human relations organizations" as a "valid alternative to the draft" (R. 110-115). Asked subsequently for his views on the burning of draft cards, Bond stated that, although he would not burn his own, he admired the courage of those who did (R. 41).

On January 10, 1966, when the Legislature convened, five petitions contesting Bond's right to be seated were filed

* Numerals in parentheses, preceded by the letter "R." refer to pages of the Record.

by members-elect of the House of Representatives (R. 5). That same day, a hearing before a Special Committee of the House was held in the House chamber, to consider two of these petitions. The essential thrust of both petitions was that, by making the statements described above, Bond had demonstrated that he would not uphold the Constitution of the United States and Georgia, that he therefore was not able in good faith to take the oath of office and that hence he was not qualified to be a member of the Georgia House of Representatives (R. 13-15, 18-21). One of the petitions contended also that, by making those statements, Bond was guilty of treason as well as criminal violations of the Universal Military Training and Service Act (R. 14).

At the hearing, the Special Committee heard evidence of the statements made by Bond, and Bond reiterated and explained his views, as follows (R. 41):

> I have never suggested or counseled or advocated that any one other person burn their draft card. In fact, I have mine in my pocket and will produce it if you wish. I do not advocate that people should break laws. What I simply try to say (sic) was that I admired the courage of someone who could act on his convictions knowing that he faces pretty stiff consequences.

At the same time, he stated his willingness and desire to take the oath of office (R. 23). At the conclusion of the hearing, the Committee recommended to the House and the House by majority vote resolved that Bond should not be allowed to take the oath of office or be seated as a member (R. 26-27).

A few days later Bond, together with the other appellants, Dr. Martin Luther King, a resident but not a reg-

istered voter in House District 136, and Mrs. Arel Keyes, a resident registered voter who voted for Bond in the primary and special elections, commenced this class action for a declaratory judgment and an injunction alleging *inter alia* that, by denying Bond his seat, the Georgia House had deprived Bond, the other appellants and the class they represent of rights guaranteed by the First and Fourteenth Amendments of the United States Constitution and had impaired the constitutional guaranty of a republican form of government, contained in Article IV, Section 4 of the Constitution of the United States (R. 1-13).

A special three-judge court was designated to hear and determine the action (R. 100-101). Defendants moved to dismiss the complaint on the ground that there was no substantial question concerning deprivation of federally protected rights and that the court was therefore without jurisdiction to review the matters in controversy which by state law are vested solely in the Georgia House of Representatives (R. 121-125). This motion was denied (R. 139-140). In addition, the defendants moved to strike Dr. King and Mrs. Keyes as parties plaintiff (R. 102-103). This motion was granted on the ground that they "do not have such a direct interest in the litigation as would give them standing to bring the complaint" (R. 141).

On the merits, the court below dismissed the complaint, Chief Judge Tuttle dissenting. On the issue whether Bond was deprived of his rights under the First Amendment, the majority held that the test to be applied was whether there was "a rational evidentiary basis for the ruling of the House"; i.e., whether there was "any evidence" to sustain the ruling (R. 151). It concluded that Bond's "statements

and affirmation of the SNCC statement as they bore on the functions of the Selective Service System could reasonably be said to be inconsistent with and repugnant to the oath which he was required to take and hence, to provide "a rational basis for the action of the House" (R. 153).

The court below handed down its opinion and order on February 14, 1966. On February 18, 1966, the regular session of the Legislature adjourned (p. 5, Jurisdictional Statement and Motion to Advance). On February 23, 1966, in a new special election called by the Governor, Bond was elected again to represent House District 136, this time without opposition, for the term expiring January 1, 1967. Although the Legislature was not in session, the Rules Committee of the House, after a hearing in which Bond reiterated his earlier views, again prevented him from taking his seat. Finally, on September 14, 1966, Bond won the Democratic primary election held to select the Democratic candidate for representative from House District 136 for the next term (*ibid;* Appellant's Brief, p. 9).

## Question to Which This Brief is Addressed

This brief is addressed only to the question whether, when a state legislative body excludes a duly elected member solely because of statements made by him on political issues in public controversy, it

(a) Violates the rights of the member to freedom of speech as guaranteed by the First Amendment of the United States Constitution, as made applicable to the States by the Fourteenth?

(b) Violates the rights of his constituents to equal representation in the legislature, as guaranteed by the Equal Protection Clause of the Fourteenth Amendment?

(c) Violates the guaranty of a republican form of government contained in Article IV, Section 4, of the Constitution?

## Interest of the American Jewish Congress

The American Jewish Congress was formed in part to "help secure and maintain the * * * political * * * rights of Jews everywhere" and "to help preserve and extend the democratic way of life." Traditionally, it has demonstrated a special interest in protecting the institutions and instrumentalities of representative self-government against decay from within and attack from without. We believe that this Court's resolution of the issues raised by this appeal and, in particular, of the question to which this brief is addressed, will have significant consequences for our system of representative self-government and for our democratic way of life.

Particularly in the present stage of our country's efforts to solve its agonizing racial difficulties, the action of the Georgia House of Representatives is a matter of the gravest concern. Among both Negroes and whites there are many who have come to doubt whether the "American dilemma" can be solved by orderly constitutional procedures. The American Jewish Congress believes and has urged that, once the right to vote is fully secured by Negroes, they can use it effectively to obtain redress of their

grievances. To tell Negroes today that their votes may be nullified if they use them to elect representatives whose views are offensive to the white majority is to discourage resort to constitutional processes. We should then not be surprised if they resort instead to the methods of violence and revolution.

## Argument

In this brief we have elaborated upon a single theme—that a State legislature may not deny a member his legislative seat because of public statements made by him on political issues. We recognize that this case may be disposed of on the basis of other points made by appellant: that the Georgia House of Representatives did not have the power under Georgia law to bar Bond from office; that the oath of office Bond was required to take, as interpreted by the court below, is unconstitutionally vague; that the disqualification of Bond was a bill of attainder and an *ex post facto* law; or that, on the record, there was no rational evidentiary basis for the conclusion of the House that Bond's political statements were inconsistent with his oath of office.

We contend that a disposition of this case on any of these narrow grounds would not decide the fundamental question squarely raised by the record here—whether the results of an election can be set aside by a State legislative body because of its displeasure with the political views of the successful candidate. For example, a legislature might establish a clear statutory rule imposing political qualifications for membership which, if applied prospec-

tively, would survive challenge under the *ex post facto* and other constitutional provisions invoked by appellants. Indeed, in view of the fact that the Georgia House has twice refused to seat Bond, any decision by this Court resting on the absence of State constitutional or legislative authorization would probably be viewed as an invitation to enact appropriate enabling laws.

Since a decision in this case on narrow grounds could so easily be surmounted, we have briefed only the broad issue, in the hope that this Court will reach it squarely and leave no doubt as to the extent of the power of state legislatures to expel or exclude duly elected members.

## POINT ONE

### The action of the Georgia House of Representatives impaired Bond's freedom of speech in violation of the United States Constitution.

Freedom of speech, guaranteed against federal infringement by the First Amendment and against State infringement by the Due Process Clause of the Fourteenth Amendment, has a preferred place in our constitutional system. When the rights of the people to freedom of expression are limited by legislation, the "usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945). Freedom of expression is among "those liberties of the individual which history has attested as the indispensable conditions

of an open as against a closed society [and which therefore] come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." Mr. Justice Frankfurter concurring in *Kovacs* v. *Cooper*, 336 U. S. 77, 95 (1949). "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." *Schneider* v. *New Jersey*, 308 U. S. 147, 161 (1939). The "subordinating interest of the State" required to justify restraint on free speech "must be compelling." *Sweezy* v. *New Hampshire*, 354 U. S. 234, 265 (1957); *NAACP* v. *Alabama*, 357 U. S. 449, 463 (1958). For there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times* v. *Sullivan*, 376 U. S. 254, 270 (1964). See also *Kingsley Int'l Pictures Corp.* v. *Regents*, 360 U. S. 684, 688-689 (1959).

It should be clearly understood that no suggestion was made by the court below, and it is not now argued, that any of Bond's statements fell outside the area of speech protected by the First Amendment. It is not claimed that he engaged in any illegal conduct, such as direct incitement of forceful overthrow of government. Even accepting the finding of the court below that reasonable men could conclude that Bond's statements were inconsistent with the oath he would have had to take as Representative, they were still constitutionally privileged. Hence, it is not necessary for this Court to consider whether a duly elected

legislator can be barred from taking his seat because the legislature believes, although it has not been proved, that he has engaged in conduct that is, or could constitutionally be made, illegal.

We submit that there can be no governmental interest sufficiently compelling to permit a State legislative body to exclude from its membership a duly elected representative because of his advocacy of any political doctrine or policy, no matter how noxious or repugnant it may be to the views of the legislative majority. The same necessities of self-government which dictate the preferred constitutional position of the citizens' First Amendment rights dictate as well that the legislator's right to speak on all public issues, outside as well as within the legislative chambers, should be free of the kind of restraint the Georgia House of Representatives imposed on Bond.

The simplest meaning of representative self-government is that the people, while retaining their ultimate sovereignty, delegate the tasks of deciding public issues to elected representatives. If a legislative majority be permitted to unseat a minority (whether of one or more) because of the minority's political views, that would be the beginning of the end of representative self-government. For the electorate to choose its legislative representatives intelligently, it must be informed of the candidate's views, particularly on issues which are matters of intense public controversy. Conversely, to persuade the electorate of the wisdom or danger of any public policy, the legislator must advocate his views persuasively to his constituency. Finally, an elected representative, to perform his function ef-

fectively, must constantly seek support not only within the legislative body itself but outside in the court of public opinion. Thus, a legislator who boldly speaks his mind on public issues within or outside the legislative chamber is not merely exercising a protected constitutional right; he is performing a public duty. To deny a duly elected representative his legislative seat because of his public statements on political issues is to abort the essential processes of persuasion and deliberation by which our system of representative self-government achieves its appointed tasks.

Nor is the protection of the First Amendment diminished when a State legislator addresses himself to national rather than state or local issues. The functions and powers of a State legislature are inextricably related to those of the national government. One need only remember that, under Article V of the United States Constitution, a State legislature may propose and must ratify amendments to the Constitution. And a State legislative body may otherwise consider and pass upon questions of national policy and concern. See: Interposition Resolution, approved March 9, 1956 (H. R. 185), Georgia Laws, 1956 Session; Impeachment Resolution, approved February 22, 1957 (H. R. 174), Georgia Laws, 1957 Session.

This Court in the past has acknowledged the necessity of granting legislators an extended range of freedom of political expression. Thus, it has liberally construed Article I, Section 6, Clause 1, of the United States Constitution which provides that Senators and Representatives "shall not be questioned in any other Place * * * for any

speech or debate in either House." *Kilbourn* v. *Thompson*, 103 U. S. 168 (1880). "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators." *Tenney* v. *Brandhove*, 341 U. S. 367, 377 (1951). See also, *United States* v. *Johnson*, 86 S. Ct. 749 (1965).

Although no similar federal constitutional grant of legislative privilege applies to the states, this Court has said of state elective officials that "the role [they] play in our society makes it all the more imperative that they be allowed to express themselves on matters of current public importance." *Wood* v. *Georgia*, 370 U. S. 375, 395 (1962). Moreover, this Court has suggested that a candidate for state elective office may not be denied a place on the ballot because of his political views. In *Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56 (1951), a Maryland statute requiring candidates for public office to file an affidavit avowing that they are not "subversive persons" was saved from unconstitutionality by interpreting it to mean that "to obtain a place on a Maryland ballot a candidate need only make oath that he is not a person who is [actually] engaged 'in one way or another in the attempt to overthrow the government by force or violence' and that he is not knowingly a member of an organization engaged in such an attempt." Mere *advocacy* was apparently deemed an insufficient reason to deny a place on the ballot to a candidate for elective office. *A fortiori*, it is an insufficient reason to deny him his legislative seat after he has been duly elected.

We are not suggesting that a state legislature is without constitutional power to regulate the speech or conduct of its members or to enforce such regulation by appropriate sanctions, including expulsion or exclusion. However, such regulation must bear some rational relationship to the orderly conduct of the legislature's business. Thus, the legislature may lay down rules restricting and controlling the time and sequence of legislative debate, applicable to all members regardless of political persuasion. Similarly, the legislature may appropriately insist that certain forms of courtesy and decorum be observed by its members. But, if the great design of the First Amendment—to serve the needs of representative self-government—is to be realized, it surely must be understood to mean that a state legislative body may not expel or exclude a member because of the substance of what he says, at least as long as his statements are constitutionally privileged.

Our recent history is replete with instances in which a legislative majority has erroneously characterized those holding contrary views as treasonable or seditious. Ten years ago, the Georgia House demanded the removal from office of six members of this Court, for "attempting to subvert the Constitution of the United States" and for "giving aid and comfort to the enemies of the United States." H.R. 185, Georgia Laws, 1956 Session. As Alexander Hamilton long ago reminded us, if the legislature "may banish at discretion all those whom particular circumstances render obnoxious without hearing or trial, no man may be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government would be a mockery of common sense." Quoted in *United States* v. *Brown*, 381 U. S. 437, 444 (1965).

We are aware that this Court in the past has declined to interfere with legislative bodies in the exercise of their traditional powers to judge the qualifications of state elective officials. *Taylor* v. *Beckman,* 178 U. S. 548 (1900); *Cave* v. *Missouri,* 246 U. S. 650 (1918); *Walton* v. *House of Representatives of the State of Oklahoma,* 265 U. S. 487 (1924); *Snowden* v. *Hughes,* 321 U. S. 1 (1944). While these earlier cases are distinguishable in a number of significant respects from the case at bar, it is sufficient to note here that in not one of them was the claim made that the legislature had impaired the federally protected and preferred right of free speech by depriving an elective official of his public office solely because of public statements made by him on political issues. Moreover, in more recent decisions, this Court has made it clear that state power, even when "acknowledged to be absolute in an isolated context," may not be "used as an instrument for circumventing a federally protected right." *Gomillion* v. *Lightfoot,* 364 U. S. 339, 347 (1960). See also, *Baker* v. *Carr,* 369 U. S. 186 (1962) and *Reynolds* v. *Sims,* 377 U. S. 533 (1964). Contrary to the views of the court below, neither "our system of federalism" nor the doctrine of separation of powers permits the Georgia legislature to ignore the requirements of the First Amendment. *Sweezy* v. *New Hampshire, supra.*

## POINT TWO

**The action of the Georgia House of Representatives impaired the right of Julian Bond's constituents to be represented in the Georgia Legislature, in violation of the Equal Protection Clause of the Fourteenth Amendment.**

By denying Julian Bond his legislative seat, the Georgia Legislature also disenfranchised his constituents in violation of the Equal Protection Clause of the Fourteenth Amendment. "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in State as well as Federal elections." *Reynolds* v. *Sims,* 377 U. S. 533, 554 (1964). This protection bars not merely state action denying access to the ballot box but also state action which debases or dilutes the weight of a citizen's vote or which effectively nullifies it *Reynolds* v. *Sims, supra; Smith* v. *Allwright,* 321 U. S. 649 (1944); *Terry* v. *Adams,* 345 U. S. 461 (1953).

More particularly, a state violates the Equal Protection Clause if it denies legislative representation to any constituency because of the political views of its residents. *Carrington* v. *Rash,* 380 U. S. 89, 93-94 (1965). We submit that that clause is equally violated if the state accomplishes the same result indirectly by expelling or excluding the duly elected representative of such a constituency.

With these principles in view, consider the realistic posture of the case now before this Court.

Until the reapportionment of the Georgia House of Representatives in 1965, brought about by the decision of

the court below in *Toombs* v. *Fortson*, 241 F. Supp. 65 (N. D. Ga. 1965) (which in turn followed the reapportionment decisions of this Court), Fulton County had three seats in the House. As a consequence of reapportionment, Fulton County gained additional seats, including a seat for the area designated as House District 136, where over 90% of the registered voters are Negro. Bond then won the election in House District 136 by an overpowering majority. However, he was denied his seat because, in the opinion of a majority of the legislature, his expressed political views were inconsistent with the oath of office he was required to take. Bond was then elected again to the same seat for the same term of office after his political views and associations had been widely publicized throughout the State and the country. The Georgia House, acting through its Rules Committee, again refused to allow Bond to take office.

The voters in the 136th House District have thus expressed in no uncertain terms their desire to be represented in the Georgia House of Representatives by Julian Bond. They have thereby endorsed the political philosophy for which he stands. It must be assumed that a majority of the voters in that district share the views expressed by Julian Bond and want them voiced in the House, despite the objections of a majority of that body.

We submit that representation of the people in legislatures, federal, state and local, is not a matter of personalities. The people are called upon in our system of government to vote on the basis of the views that will be expressed and the votes that will be cast by their representatives. It is not enough that some one of their number will

be allowed to sit in the House. He must be one who represents them. The "Representative" who sits in the lower house of the Georgia Legislature represents the *will* of the people, not merely their physical existence.

The Georgia House of Representatives has in effect told the people of the 136th District that they may not be represented at the State Capitol by one who expresses their political wishes. This is to say that they may not be represented at all. Although the House has presumably not barred all residents of the District from participating in its deliberations, it has said that no one representing their viewpoint may do so. This is to disfranchise the electorate.

In the words of Charles Evans Hughes, speaking of the five Socialist members of the New York Assembly excluded from that legislative body in 1920:

> Let every resource of inquiry, of pursuit, of prosecution be employed to ferret out and punish the guilty according to our laws. But I count it a most serious mistake to proceed not against individuals charged with violation of law, but against masses of our citizens combined for political action, by denying them the only resource of peaceful government; that is, action by the ballot box and through duly elected representatives in legislative bodies. Quoted in Chafee, *Free Speech in the United States,* p. 273.

## POINT THREE

**The action of the Georgia House of Representatives violated the guaranty of a republican form of government contained in Article IV, Section 4, of the Constitution.**

The exclusion of Julian Bond from the Georgia House of Representatives, we believe, attacks the very root and foundation of republican government—i.e., the concept that the "Supreme Power resides in the people." *Chisholm* v. *Georgia,* 2 U. S. 419 (1793). We urge, therefore, that this is an appropriate case for this Court to take action under Article IV, Section 4, of the Constitution, which enjoins that "the United States shall guarantee to every State in this Union a Republican Form of Government."

We are aware that ever since *Pacific States Telephone and Telegraph Co.* v. *Oregon,* 223 U. S. 118 (1912) this Court has rejected all claims under the Guarantee Clause on the theory that such claims raise "political questions" which are non-justiciable. We submit, however, that the political question doctrine was misapplied in *Pacific States,* and the cases which followed it, and has no proper application to the case at bar.*

The political question doctrine was first applied to a Guarantee Clause case in *Luther* v. *Borden,* 48 U. S. 1 (1849). In that case, the Court was called upon, after the event, to decide which of two competing governments had been the lawful government of Rhode Island during a pe-

* The argument set forth below is fully developed in Scharpf, *Judicial Review and the Political Question: A Functional Analysis,* 75 Yale L. J. 517, 586-597 (1966).

riod of revolutionary unrest in 1842. The court held that the state courts had decided the issue and that it was bound by that decision. By way of dicta, however, it noted that, to the extent that the Federal Government had any warrant for interfering in such contests, Article IV, Section 4, had delegated this power to Congress: "* * * when the senators and representatives of a State are admitted into the Councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority." 48 U. S. at 42.

This simple principle—that Congress alone has the power to determine the lawful government of a state—was applied in a number of subsequent cases. *Texas* v. *White,* 74 U. S. 700 (1869). (Only Congress had the power to reestablish and to recognize governments in the rebel states.) *Taylor* v. *Beckman,* 178 U. S. 548 (1900). (The Court declined to decide, under Article IV, Section 4, which of two candidates had been elected governor of Kentucky.)

Initially, the political question doctrine was invoked in Guarantee Clause cases only where the claim attacked the legitimacy of a state government or one of its branches. The doctrine was not applied where a state statute was challenged as incompatible with standards of republican government. Thus, in *Attorney General of Michigan ex rel. Kies* v. *Lowry,* 199 U. S. 233 (1905), the Court decided on the merits that the Michigan Legislature did not contravene Article IV, Section 4, by altering the boundaries of local school districts and transferring property from one to the other. In *Forsythe* v. *City of Hammond,* 166 U. S. 506 (1897), it was held that the state judiciary could de-

termine municipal boundaries without violating the Guarantee Clause. In *Minor* v. *Happersett*, 88 U. S. 162 (1875), the Court held that republican government does not require women's suffrage.

The idea that any Guarantee Clause claim—even if directed not at the legitimacy of a state government but only at a single state law or rule—raises a political and hence nonjusticiable question was first adopted by this Court in *Pacific States Telephone Co.* v. *Oregon, supra.* In that case, the defendant company had claimed that a special tax on the gross revenues of telephone and telegraph companies was unconstitutional because it was enacted through an initiative procedure, a form of direct democracy which the defendant company deemed repugnant to standards of republican government. The Court, citing *Luther* v. *Borden, supra,* as a "leading and absolutely controlling case," held that it was without jurisdiction.

The Court's decision in *Pacific States* rested on the premise that, if the Court had decided the case on the merits for the defendant: (1) its decision would effectively invalidate all acts of the Oregon government and free its citizens from any obligation to obey its laws; (2) it would thus force the Court into a direct conflict with the Congress which alone has the power to determine the legitimacy of state governments. 223 U. S. at 141-142.

We believe that the premise on which the *Pacific States* decision rests is demonstrably false. There is no reason why the unconstitutionality of a single act of a state government or one of its branches should be deemed a challenge to the legitimacy of the whole state government or

any of its branches. This is so whether the challenged legislation, act or rule of the state violates the Due Process Clause of the Fourteenth Amendment or the Guarantee Clause.

Moreover, had the Court decided the case on the merits, there was no possibility that it could have been forced into conflict with Congress. By seating representatives and senators from Oregon, Congress may have determined the legitimacy of that state's government but it surely did not determine the compatibility of the initiative procedure with republican standards. A finding by the Court on the merits —either for or against the defendant company—would not have interfered with either the legislative or executive branches in the performance of their respective responsibilities under the Guarantee Clause. Indeed, a decision on the merits for the defendant would not necessarily have put in jeopardy all the statutes theretofore adopted by the initiative procedure. By applying the decision prospectively and granting all prior statutes adopted by the initiative method the recognition frequently given to a *de facto* government, there would have been no risk of incurring the disorder which the political question doctrine seeks to avoid. *Baker* v. *Carr,* 369 U. S. 186, 250 (1962).

The *Pacific States* decision, arguably, might be justified as judicial deference to the possibility of some *future* political determination by Congress of the issue before the Court (i.e., the compatibility of the initiative to republican standards of government). This may not be said, however, of the many cases which followed in the wake of *Pacific States.* Thus, the following claims made under the Guarantee Clause were found by this Court to present political ques-

tions and therefore to be non-justiciable: (1) that Nebraska could not delegate to an inferior court the power to organize and manage drainage districts (*O'Neill* v. *Leamer*, 239 U. S. 244 (1915)); (2) that Virginia could not delegate power to its Milk Commission to fix prices for cream (*Highland Farms Park, Inc.* v. *Agnew*, 300 U. S. 608 (1937)); and (3) that Ohio could not require the concurrence of all but one of the judges of its Supreme Court to invalidate a statute (*Ohio ex rel. Bryant* v. *Akron Park District*, 281 U. S. 74 (1930)).

The admission by the Congress or representatives and senators from the various states may not realistically be construed as a determination by Congress of issues of this kind. A decision by the Court on the merits in any of these cases would not have placed in jeopardy any act or statute other than the one before the Court. The doctrine of *Luther* v. *Borden, supra*, i.e., that the power to grant recognition and legitimacy to state governments is entrusted to the Congress, simply has no relevance or application to any of these claims. So, too, if this Court were to decide on the merits whether the Guarantee Clause was impaired by the resolution of the Georgia Legislature denying Julian Bond his legislative seat, such a decision would not in any way place in jeopardy the legitimacy of the Georgia State government or of its legislative branch; nor would it place this Court in conflict with either the President or the Congress.

In any event, we believe with Justice Frankfurter that this Court's decision in *Baker* v. *Carr, supra*, effectively repudiated the *Pacific States* decision and the whole line

of cases which follow it. As Justice Frankfurter noted in his dissenting opinion, "the present case involves all the elements that have made the Guarantee Clause case non-justiciable. It is, in effect, a Guarantee Clause claim masquerading under a different label." 369 U. S. at 297.

We therefore urge the Court now to rescue the Guarantee Clause from its ill-deserved state of constitutional desuetude. While there may be functional and persuasive reasons for this Court to decline to assert jurisdiction where a claim is made attacking the legitimacy of a state government, such reasoning has no force in a case of this kind. We do not argue that the Georgia government is no longer entitled to Congressional recognition as the legitimate government of that state, or that all acts of the Georgia Legislature adopted in Bond's absence are invalid. We call into question only the resolution of the Georgia Legislature excluding Julian Bond from its membership, no more.

We recognize that, because this Court for so long has declined jurisdiction in Guarantee Clause cases, it has not yet fully defined the essential requirements of republican government. But fifty years ago, although the Court had not yet given definite meaning to the Due Process Clause, it did not therefore decline jurisdiction of due process cases. We therefore respectfully suggest that the time is now ripe to begin to develop judicial criteria by which the compatibility of acts and resolutions of a state legislature with republican standards of government may be judicially determined.

In *Chisholm* v. *Georgia, supra,* this Court characterized a republican form of government as one in which "the Supreme Power resides in the people." No more precise definition is required to determine this case under the Guarantee Clause. To deny a duly elected representative his seat in the legislature because of his statements on issues of public policy is to deny the people their sovereign power and so to impair the constitutional guarantee of the republican form of government. We therefore urge this Court to hold that, under Article IV, Section 4, of the United States Constitution the Georgia Legislature had no constitutional right or power to deny Bond his seat.

## Conclusion

**It is respectfully submitted that the judgment below should be reversed on the ground that the Georgia House of Representatives was without power to refuse to seat a duly elected representative because of his public expression of views on political issues.**

Respectfully submitted,

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